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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LEON MCDONALD BROWN, Defendant and Appellant.	B200983 (Los Angeles County Superior Ct. No. BA260644)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael E. Pastor, Judge. Affirmed as modified.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Leon McDonald Brown appeals from the judgment entered following a jury trial in which he was convicted of two counts of murder; two counts of willful, deliberate, and premeditated attempted murder; mayhem; attempted second degree robbery; and shooting at an occupied motor vehicle, with gang, great bodily injury, and firearm-use findings. Appellant raises numerous contentions, including a violation of the Confrontation Clause, insufficiency of the evidence, and evidentiary, instructional, and sentencing errors. We strike two determinate gang enhancements imposed on counts on which appellant was sentenced to life without possibility of parole, but otherwise affirm.

FACTS

On the night of January 31, 2004, a group of 12 friends aged approximately 15 to 20 attempted to attend a "flier party" at a mansion at the corner of Arlington and Adams.[1] They arrived at the scene in three cars. Two of the young women in the group walked to the gate and asked co-defendant Frank Williams if the party was "good." Williams said it was, and they were welcome. The women returned to their friends and suggested everyone should go into the party. Most of the group got out of the cars and walked toward the gate.

As the group neared the gate to the grounds, appellant drew a gun and spoke to the group in a hostile manner. Jose Alvarado Velasquez testified appellant asked his group where they were from and whether they were "from anywhere." Velasquez understood this to be an inquiry about gang affiliation. Appellant also asked what they were doing there and told them to leave. Ruben Sandoval testified appellant asked why people in the group were looking at him as if they were "going to do something" and told them to "get

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[1] A "flier party" is a party advertised by fliers to which the public is invited.

the fuck out of there." Walter Hernandez testified one of the men at the gate repeatedly and aggressively asked what they were looking at, drew his gun, and threatened to "dump on" them.[2] Several members of the group told appellant that everything was "okay" and their group would leave immediately.

Everyone in the group turned around and walked toward their cars. Appellant ran up to Miguel Meza, pointed the gun at him and asked Meza, "What do you have on you?" Meza thought appellant wanted money, and said he had nothing. Appellant said, "Let me get that jersey," referring to a Celtics jersey Meza was wearing. As Miguel took off the jersey, appellant walked or ran toward Velasquez's car and began firing at it. Witnesses estimated they heard 10 to 30 shots. When the shooting stopped, Meza saw appellant get into a silver Explorer and drive away quickly. Meza got into Sandoval's car, and Velasquez and Sandoval started their cars and drove quickly away. The third car, driven by Cesar Maldonado, was already moving when appellant began shooting.

After driving several blocks, Velasquez began to feel faint and pulled his car to the curb. The other two cars also pulled over. Velasquez and all three of his passengers had been shot. Backseat passenger Jason Ramos was dead. His sister Shulma Ramos, who was the front seat passenger, was alive but mortally wounded. Walter Hernandez, the second backseat passenger, suffered a through-and-through shot to his hand. Velasquez had six gunshot wounds, including several to his legs and one that shattered his jaw.

Near the street outside the mansion, the police recovered 27 nine-millimeter Luger cartridge casings that had been ejected from the same gun. They also recovered four .380 caliber casings, all of which had been ejected from a single gun. Examination of Velasquez's car revealed 30 bullet trajectories. Twenty-eight of those included dents establishing that the shots were fired from outside the car. The prosecution's expert opined that the other two trajectories also originated from outside the car, but there was insufficient evidence to establish that with complete certainty. The police also recovered

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[2] Hernandez identified appellant prior to, but not at, trial.

several bullets and bullet fragments from Velasquez's car. Some of these were consistent with nine-millimeter Luger rounds, and one bullet was consistent with a .380 automatic caliber round. The prosecution's firearms examiner was able to determine that all but three of the bullets that were consistent with nine-millimeter Luger ammunition were fired from the same gun. The condition of the three remaining bullets consistent with nine-millimeter Luger rounds did not permit him to make such a determination.

Although none of the victims or their friends saw a second shooter, defendants' friend Chris Smith told the police he saw co-defendant Williams firing a TEC-9 gun.

The jury convicted appellant of the first degree murder of Jason and Shulma Ramos; the willful, deliberate, and premeditated attempted murder of Jose Velasquez and Walter Hernandez; mayhem; attempted second degree robbery; and shooting at an occupied motor vehicle. The jury found as special circumstances that appellant committed both murders while he was an active participant in a criminal street gang and the murders were carried out to further the activities of the gang (Pen. Code, § 190.2, subd. (a)(22)),[3] appellant committed multiple murders (§ 190.2, subd. (a)(3)), and appellant committed the murders while engaged in an attempted robbery (§ 190.2, subd. (a)(17)). The jury further found all of the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). It further found that, in the commission of every offense, appellant personally and intentionally fired a gun, causing death and great bodily injury; personally and intentionally fired a gun; and personally used a gun. (§ 12022.53, subds. (b), (c), and (d).) It found that, in the commission of every offense except the attempted robbery, a principal personally and intentionally fired a gun, causing death and great bodily injury; personally and intentionally fired a gun; and personally used a gun. (§ 12022.53, subds.

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[3] Unless otherwise noted, all statutory references pertain to the Penal Code.

(b), (c), (d), and (e)(1).) The jury also found, with respect to counts 3, 4, and 7, that appellant personally inflicted great bodily injury. (§ 12022.7, subd. (a).)

For the two murder counts, the court sentenced appellant to consecutive terms of life in prison without possibility of parole, plus 25 years to life (§ 12022.53, subd. (d)), plus 10 years (§ 186.22, subd. (b)(1)(C)). For the two attempted murder counts, the court sentenced appellant to consecutive terms of 15 years to life, plus 25 years to life (§ 12022.53, subd. (d)).[4] The court imposed a consecutive term of 2 years, plus 25 years to life (§ 12022.53, subd. (d)), plus 10 years (§ 186.22subd. (b)(1)(C)) for appellant's attempted robbery conviction. The court stayed, pursuant to section 654, the terms for the convictions for mayhem and shooting at an occupied vehicle.

DISCUSSION

1. Admission of Chris Smith's preliminary hearing testimony

The prosecutor introduced Chris Smith's preliminary hearing testimony at the trial after the trial court found Smith was unavailable as a witness. Appellant contends the court erred by finding the prosecution had exercised reasonable diligence in attempting to locate Smith, and that the admission of Smith's former testimony violated appellant's constitutional right of confrontation.

A defendant has a federal and state constitutional right to confront the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right, however, is not absolute. In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, the United States Supreme Court reaffirmed a long-standing exception permitting the admission of "testimonial statements of witnesses absent from trial … where the declarant is unavailable, and … the defendant has had a prior opportunity to cross-examine." (*Id*. at

p. 59.) "Evidence Code section 1291 codifies this traditional exception. [Citation.] When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]'" (*People v. Wilson* (2005) 36 Cal.4th 309, 340, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 742.)

Evidence Code section 1291, subdivision (a)(2), provides that former testimony is admissible if the declarant is unavailable and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A declarant is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) The proponent of the evidence must introduce competent evidence to establish the witness's unavailability. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1296.)

Reasonable diligence "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Cromer* (2001) 24 Cal.4th 889, 904.) Relevant considerations include whether the search for the witness was timely begun, the importance of the witness's testimony, and whether leads were competently explored. (*Ibid.*) The adequacy of the effort depends upon the particular circumstances of the case. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) The court must consider the totality of the proponent's efforts to procure the witness's attendance. (*Ibid.*)

We apply a deferential standard of review to the trial court's factual findings regarding the steps taken by the prosecution to attempt to locate the absent witness, but we independently review the trial court's determination that the prosecution's efforts are sufficient to justify an exception to appellant's constitutional confrontation right. (*People*

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4 The court also imposed and stayed three-year enhancements (§ 12022.7, subd. (a))

v. Cromer, *supra*, 24 Cal.4th at pp. 900-901.)

Jury selection in appellant's trial commenced February 21, 2007.[5] The trial court conducted an Evidence Code section 402 hearing over the course of five days beginning February 26. Prosecution investigator Richard Collins testified that he began looking for Smith on January 31. He checked various databases and visited five addresses in Fontana, Rialto, and San Bernardino, but he did not locate Smith or his father or obtain information regarding a new address. The owner of one property Collins visited provided information about Smith's stepmother. Collins called telephone numbers he found in his database search but did not reach Smith. A woman who answered one of the phones said Smith was "not around at that time." Collins gave her his contact information. On the morning of February 5, Collins received a voicemail from a person who identified himself as Smith but left no contact information. Collins checked with the Employment Development Department, the Los Angeles and San Bernardino County jails and coroners' offices, the San Bernardino County Health Department, the Department of Motor Vehicles, the Federal Bureau of Investigation, and the federal prison system, but found they had no records pertaining to Smith. The San Bernardino County jail gave Collins information about a possible relative of Smith named Debra King. Collins spoke to King, who provided no information but promised to call back.

On February 6, Collins received a phone call from Smith's stepmother, who told him Smith socialized with a Hoover gang member in San Bernardino known as "Crazo." She also said Smith's father, Billy Scruggs, was in the San Bernardino County Jail. The jail told Collins that Scruggs was to be released that day and provided Scruggs's last known address. On February 7, Smith's stepmother gave Collins a phone number for Scruggs. Collins called Scruggs and told him he needed to find Smith for a court appearance. Scruggs did not have an address for Smith or contact information for Crazo, but he promised to call Smith and ask him to call Collins.

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for each attempted murder count.

On February 21, Collins served Scruggs with a subpoena. Collins talked to the family members who were present and explained his need to find Smith. The family members were "cooperative" but did not reveal any information. On February 26, Scruggs gave Collins a "chirp number" for Smith. When Collins tried to reach Smith through this number, he merely got phone service error messages.

Detective Jeff Nolte testified he had difficulty in locating Smith prior to the preliminary hearing. Smith told Nolte he was afraid to testify and had been beaten by gang members who said, "This is because of your name showing up in the reports." Gang enforcement officers told Nolte that when the case was filed Smith expressed fear and left the area because his name appeared in one of the police reports. Just before the preliminary hearing, Smith told Nolte he would not testify truthfully because, if he did, he and his mother would be killed. In 2006, Smith's mother reported to the police that she had learned there was a "green light" on Smith. Nolte characterized Smith as an uncooperative witness at the time of the preliminary hearing.

Nolte did not attempt to have anyone locate Smith until a firm trial date approached because, in his experience, it is harder to find reluctant witnesses who are subpoenaed or placed on call if the trial gets continued, as they find it easier to avoid service when they have advance notice.

Billy Scruggs testified he last saw Smith on February 12 -- five days after Collins spoke to Scruggs. Scruggs reported that after Collins called him, he "chirped" Smith's girlfriend. Smith "chirped" back and said he would not come to court because he believed he would be arrested. Scruggs lost contact with Smith after Smith was evicted about six weeks earlier. Scruggs "chirped" Smith's girlfriend again, but she said she had not seen Smith. Scruggs had not been able to find Smith through Smith's friends.

Smith's mother, Michelle Hall, testified she had not heard from Smith since June, 2006 and did not know his phone number, address, or how to contact him.

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5 Unless otherwise noted, all date references pertain to 2007.

Smith testified at trial in a different gang-related criminal case in August, 2005. The prosecutor's investigators served Smith with a subpoena at his father's home a week or two before that trial. Smith complied with the subpoena and returned to court the next day to conclude his testimony. The prosecutor, Deputy District Attorney Joseph Porras, characterized Smith as an uncooperative witness because he testified inconsistently with his statements to the police and made claims regarding the behavior of the police officers. Smith told Porras he feared being known as a snitch.

Detective Donald Walthers testified he became involved in the search for Smith on February 26. He obtained credit reports on Smith and discovered an address Collins did not visit. The manager of that property told him Smith had been evicted about a year earlier.

Walthers detained Scruggs, who said he believed Smith was living with Tamesha Brooks or Crazo. Scruggs gave Walthers an address for Brooks and a telephone number for "Man," a close friend of Smith who would know how to contact him. Walthers went to see Brooks, who claimed she did not know how to reach Smith and was quite evasive about when she had last seen him. By looking at Brooks's mobile phone, Walthers obtained numbers for "Crazo" and "Man." About an hour after Walthers left, Brooks phoned him and said she had just spoken to Smith, who called her from a blocked number. Brooks told Smith that Walthers was looking for him, but Smith refused to take Walthers's telephone number. Walthers called "Man," who said he was a former neighbor of Smith, but had not seen Smith for several weeks. Walthers also called "Crazo." A woman answered and handed the phone to "John," who said he was Crazo's cousin and that Smith knew he was wanted in court but was not going to go. "John" said he would ask Smith to call Walthers.

Brooks called Walthers again on February 28 and said Smith had again called her from a blocked number. Brooks gave Smith Walthers's number. Smith said he was afraid he was in trouble but would call Walthers. He did not call. Walthers testified he

told Brooks and everyone he spoke to that Smith was only wanted as a witness and could avail himself of witness relocation or other protective services.

Walthers identified the owner of the telephone number he had for "Crazo," which in turn led him to Andrea Jacobs, who refused to identify "John" or meet with Walthers. "John" called Walthers back. He was angry and said he had given Smith Walthers's number, and it was up to Smith to call Walthers. Walthers eventually found an address for Jacobs and conducted surveillance at the location. He stopped an African American man leaving the residence and discovered the man was "John." His actual name was Chris Wright, a "play cousin" of Smith's. Wright told Walthers Smith knew people were trying to find him, but he did not want to be found.

Walthers called two other phone numbers he had for "Crazo," but the men who answered those phone numbers were uncooperative. Walthers conducted surveillance of a purported residence of "Crazo" but did not see anyone who matched Smith's description. The residents of the home denied knowing Smith. Walthers also attempted to call Brooks again and left messages when she did not answer.

Detective David Garrido knew Smith from the other homicide case and knew he was a member of the Rolling 20's gang and also associated with the Black P-Stones gang. On March 1, Garrido went to various places those gangs congregated and to the address he had for Smith's mother, but did not find Smith or anyone who knew him.

The trial court initially concluded the prosecution did not use reasonable diligence to locate Smith because it did not timely commence its "extraordinary" and "exhaustive" efforts until January of 2007. The court noted that although Smith was obviously hostile, antagonistic, and uncooperative in 2004, and a problem arose in 2005 with his testimony on the other case, the prosecution made no effort to contact him between October of 2004 and January of 2007. The court concluded that Smith was a critical witness, and it was incumbent upon the prosecution to keep track of him, even if doing so would be inconvenient. Accordingly, the court refused to admit Smith's former testimony.

The prosecutor subsequently sought to present evidence of the ongoing efforts to locate Smith and asked the court to reconsider its ruling. After the trial court rejected these attempts, the prosecutor filed a petition for a writ of mandate, which this court denied.

When the prosecutor again asked the trial court to reconsider its ruling, the court did so and reversed its prior decision. The court concluded it erred in its initial ruling by giving "short shrift to the fact that Mr. Smith had actually been a cooperative, albeit recalcitrant, witness …. [T]here was every indication that Mr. Smith was cooperating, albeit not happily and he did appear voluntarily in August of 2005. He complained. He criticized, but he appeared nevertheless." The court further concluded it initially erred by giving "short shrift to the realities of gang prosecutions in this time and in this place. The fact [is,] it is easy in hindsight, sitting in the sterile, antiseptic surroundings of a courtroom to second-guess strategies and tactics of members of law enforcement and the prosecution in terms of their relationship with witnesses whose lives and lives of their friends and families literally can be on the line." Citing *People v. Hovey* (1988) 44 Cal.3d 543, the court concluded it erred in effectively imposing a duty upon the prosecution to keep "periodic tabs" on Smith. The court also cited *People v. Diaz* (2002) 95 Cal.App.4th 695, and noted that, "taking into account the particular character of Mr. Smith and the specific and unique characteristics of this case, I believe upon reflection and reconsideration that such efforts would have been counterproductive and, quite frankly, fruitless. Mr. Smith would have been gone under any circumstances. At some point before this trial, despite whatever earlier cooperative efforts he may have made." Accordingly, the court found the prosecution had shown reasonable diligence, and the court permitted the prosecutor to read Smith's preliminary hearing testimony into the record and play a recording of a statement Smith gave the police.

Based upon an independent review of the record, we agree with the trial court's ultimate ruling that the prosecution satisfied its burden of showing due diligence. Investigator Collins and Detectives Walthers and Garrido searched for Smith for more

than one month. They did not confine their search to databases and governmental agencies, but tracked down Smith's father, stepmother, and several friends. Walthers investigated the sources of phone numbers and conducted surveillance. The investigator and detectives apparently exhausted every lead they obtained. Significantly, their efforts actually resulted in indirect contact with Smith, as illustrated by the voicemail message Collins received and statements to Walthers by Brooks and Wright to the effect that Smith knew Walthers was looking for him but was actively evading contact.

Although the effort to find Smith began just three weeks before trial, the results of the search demonstrate Smith was determined to evade everyone who was searching for him. There is no reason to believe the result would have been any different had the prosecution commenced the search earlier. (See, e.g., *People v. Diaz*, *supra*, 95 Cal.App.4th at p. 706 [finding reasonable diligence in trying to secure witness's presence at trial, in part, because "it is fairly clear [the witness] purposely made herself unavailable because she was unwilling to testify."].) The prosecution was not, as appellant argues, required to take steps to prevent Smith from absenting himself. (*People v. Hovey*, *supra*, 44 Cal.3d at p. 564 [prosecutors are not required to "keep tabs" on witnesses].) Moreover, "[i]t is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." (*Ibid*.) Short of incarcerating Smith or keeping him under constant surveillance for over two years, there was simply nothing the prosecutor could do to prevent Smith from disappearing. Even if officers remained in weekly contact with Smith to determine his current address and phone number, Smith could have eluded them by moving abruptly and changing, or simply refusing to answer, his phone. The failure of the prosecution's efforts to secure Smith's appearance at trial was not attributable to insufficient time or effort spent looking for him. Collins and Walthers succeeded in establishing indirect contact with Smith in the course of their search. Nothing indicates Smith's determination to evade them would have been any different or less effective had they started searching sooner.

Furthermore, the delay in searching for Smith resulted from a plausible strategy to avoid giving him advance warning, thereby assisting him in evading service. Nothing in the record indicates the prosecution acted in bad faith or was negligent. Smith's purported history of reluctance and uncooperativeness, which appellant argues required the prosecution to keep tabs on Smith, was counter-balanced by the fact that he did appear when subpoenaed to testify at appellant's preliminary hearing and at the trial in the prior homicide case.

We therefore find no error in the trial court's ultimate finding that the prosecution exercised reasonable diligence. As appellant does not challenge the adequacy of his opportunity to cross-examine Smith at the preliminary hearing, we conclude the admission of Smith's preliminary hearing testimony violated neither state law nor the Confrontation Clause. Appellant does not challenge the admission of Smith's statement to the police, which was also introduced at the preliminary hearing.

2. Sufficiency of evidence

a. Gang enhancements and gang special circumstances

Appellant contends the evidence was insufficient to establish that any of the crimes was committed for the benefit of a gang or with the specific intent to promote criminal conduct by gang members. He argues the gang special circumstance and enhancement findings rested on nothing more than his gang membership.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

The gang enhancement findings required proof beyond a reasonable doubt that appellant committed each of the offenses other than murder for the benefit of, at the

direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).) The gang special circumstance findings required proof beyond a reasonable doubt that, while appellant was an active participant in a criminal street gang, he intentionally killed each murder victim with the specific intent to further the gang's activities. (§ 190.2, subd. (a)(22).)

Substantial evidence demonstrated that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to further the gang's criminal activities. Appellant and co-defendant Williams belonged to the Black P-Stones gang and were apparently friends and/or members of the same gang sub-group, as the prosecution introduced seven photographs of Williams and appellant together, many of which depicted one or both of them forming Black P-Stones gang hand signs. According to the preliminary hearing testimony and prior statement of Chris Smith, which were introduced at trial, the charged offenses occurred about one hour after a gun attack on the party that at least some attendees blamed upon the 18th Street gang. The mansion where the party was held was within an area claimed by the Black P-Stones gang, and the party attendees were members of the Black P-Stones and the neighboring Rolling 20's gangs, which were allies.

Former Los Angeles Police Department Officer Robert Murray testified that in early 2004, the Black P-Stone gang and the predominantly Latino 18th Street gang were violent rivals. Each gang had shot members of the other gang, and a particular Latino member of the 18th Street was "indiscriminately going around killing" members of Blood gangs, such as the Black P-Stones and Rolling 20's. Many party attendees were carrying guns, and some decided to protect themselves if the shooters returned.

Velasquez testified that as he and his friends approached the entrance, appellant drew a gun and asked them where they were from and whether they were "from anywhere." This was an inquiry about the gang affiliation of Velasquez's group. Appellant also asked what they were doing there and told them to leave.

This evidence supported Murray's expert opinion testimony and placed the charged offenses into a familiar and highly plausible gang context of a gang defending its turf against incursion by a rival gang, despite the victims' apparent lack of gang affiliation. Murray opined that both the attempted robbery and all of the shooting crimes were for the benefit of the Black P-Stones gang because they would intimidate 18th Street gang members and Latinos in general and send a message that they should stay away from that location, which fell within an area claimed by the Black P-Stones gang. Murray explained that at the time of the charged offenses there was a lot of hostility between the African American and Latino communities in that area. In addition, Murray opined that the shooters may have believed the victims were members of the rival 18th Street gang. Finally, Murray noted, commission of the charged offenses would improve morale within the Black P-Stones gang because "[t]hey stood up to whoever they thought these individuals were."

Appellant argues Murray had no credibility because he initially testified on cross-examination that "any crime a gang member commits [is] for a gang." However, Murray subsequently backed off this strict liability approach and testified it would depend upon the circumstances surrounding each crime, though he believed all robberies and acts of domestic violence by a gang member would benefit the gang. A jury is entitled to reject portions of a witness's testimony and accept other portions. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) The arguably extreme and implausible aspects of Murray's testimony do not justify, let alone require, reversal of the challenged findings by the jury; it is the exclusive province of the trier of fact to determine credibility and the truth or falsity of the facts upon which credibility depends.

Finally, all of the charged offenses other than attempted robbery were committed by two members of the same gang acting in concert, which supports findings they were acting for the benefit of a gang and with the intent to further the gang's criminal activities when they fired their guns at the victims. At a minimum, their joint participation demonstrates they were acting *in association with* a gang. (*People v. Leon* (2008) 161

Cal.App.4th 149, 162.)

Viewing the evidence in the light most favorable to the jury's findings, we conclude substantial evidence established that the charged offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to further the gang's criminal activities.

b. Attempted murder

Appellant also contends the evidence was insufficient to support his attempted murder convictions. He argues there was no evidence he intended to kill anyone in the cars.

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Because there is rarely direct evidence of such intent, it must usually be shown from the circumstances of the attempt. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

In *People v. Bland* (2002) 28 Cal.4th 313, the Supreme Court held that, although the doctrine of transferred intent does not apply to attempted murder, a defendant who performs an act such as shooting at a group of people that includes his primary target or placing a bomb on board a plane on which his primary target is flying may be found to have concurrently intended to kill his primary target and everyone else within the "kill zone." (*Id.* at pp. 329-330.) Appellant acknowledges this principle, but contends it is inapplicable because the prosecutor never argued appellant intended to kill any particular person and because firing multiple gunshots into cars "does not by itself imply an intent to kill."

The cartridge casings found at the scene proved that appellant and the other gunman collectively fired at least 31 shots at Velasquez's car, in which both deceased and both injured victims were seated. At least 30 of those shots struck the car, as shown

by the prosecution's trajectory analysis. Velasquez testified that appellant was 12 feet away when he fired the first shots, but he was running toward the car. Appellant's own firearms expert testified that, based upon the bullet trajectories, the shooter was four to nine feet away from the car. Everyone in the car was struck by at least one bullet. Based upon this evidence, a rational jury could conclude beyond a reasonable doubt that appellant concurrently intended to kill one, some, or all of the people in the car. Each occupant of the car was within the "kill zone" when appellant unleashed a lethal torrent of gunfire upon it.

Appellant argues there was no evidence of animosity between appellant and any of the car's occupants. This argument confuses motive and intent. Appellant's murderous intent was apparent in his conduct of spraying a small, parked car containing four people with gunfire at relatively short range. Moreover, as addressed in the preceding section, the evidence showed a gang-related motive for the violent attack.

3. Allegation that a juror fell asleep

During the testimony of a prosecution witness, counsel for appellant informed the court that Juror 2 "appear[ed] to be falling intermittently in and out of sleep." Counsel for co-defendant Williams said it was Juror 8, and she had "nodded out a couple of times." The court responded that it had "looked at all the jurors, and every once in a while jurors sit back. I noticed her sitting back. I didn't get the impression she was on the nod." The court promised to watch the juror and remind jurors it was important for them to pay attention and request breaks whenever they felt they needed them. Defense counsel did not request that the court investigate or conduct a hearing.

Appellant now contends the trial court erred by failing to investigate or conduct a hearing regarding defense counsels' report that the unidentified juror had been falling asleep. He further argues the juror's "infirmity of sleep" left her unable to perform her duties and violated his rights to due process and a unanimous verdict.

A defendant has a constitutional right to an impartial jury willing to decide the case solely on the evidence before it. (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.) This right is protected by the trial court's authority to replace a juror for good cause, which includes sleeping through a material portion of the trial. (§ 1089; *People v. Bradford* (1997) 15 Cal.4th 1229, 1349 (*Bradford*).) When a trial court is put on notice that good cause to discharge a juror may exist, "it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (*People v. Espinoza* (1992) 3 Cal.4th 806, 821 (*Espinoza*).) Both the scope of such inquiry and the ultimate decision whether to retain or discharge a juror are committed to the sound discretion of the trial court. (*People v. Bonilla* (2007) 41 Cal.4th 313, 350.) If any substantial evidence exists to support the trial court's exercise of its discretion, the court's action will be upheld on appeal. (*Bradford*, *supra*, 15 Cal.4th at p. 1351.)

Counsels' reports suggesting the juror appeared to be falling asleep were mere speculation and did not trigger the court's duty to investigate. (*Espinoza*, *supra*, 3 Cal.4th at p. 821.) Discharge of a juror is not required absent evidence the juror was asleep for a substantial period of material portions of the trial. (*Bradford*, *supra*, 15 Cal.4th at p. 1349.) Moreover, the trial court's comment demonstrates that it was alert to the risk of jurors falling asleep and was watching the jurors to ensure they remained awake. Based upon its own observations, the court found defense counsels' claims were not true. Nothing more was required of the court. (*People v DeSantis* (1992) 2 Cal.4th 1198, 1233-1234 [trial court conducted a constitutionally adequate "self-directed inquiry" when it relied upon its own observations of jurors to reject counsel's allegations that several jurors were sleeping].) Counsels' failure to request a hearing or assert misconduct by the juror "further indicates that the juror's conduct had not warranted such a hearing." (*Bradford*, *supra*, 15 Cal.4th at p. 1349.) The trial court did not abuse its discretion or violate appellant's constitutional rights.

4. Display of demonstration weapons

Neither gun used in the charged offenses was recovered. The prosecutor repeatedly sought to introduce a silver-colored .380 caliber semiautomatic handgun (".380") and an Intratec TEC-9 ("TEC-9") from the police collection for demonstrative purposes. The trial court twice sustained defense objections to this evidence.

Daniel Rubin, the prosecution's firearms expert, subsequently testified that the presence of 27 nine-millimeter expended cartridge casings at the crime scene suggested that the gun either had a high-capacity magazine or the shooter reloaded a smaller capacity magazine. Rubin testified that firing the shots in "fairly rapid succession, within a very short period of time," would be consistent with use of a gun with a high-capacity magazine. A TEC-9 would be one of the guns that could accommodate a magazine that held at least 27 cartridges.

The prosecutor renewed her request to introduce the demonstration guns, explaining that the .380 was consistent in appearance with the gun described by the victims, and Yuseff Sinclair, whom the prosecution intended to call as a witness, told the police he saw co-defendant Williams with a TEC-9 at the party.[6] Both defendants objected that the introduction of the guns would be more prejudicial than probative and that the state of the evidence with respect to the guns had not changed since the court's earlier ruling. The prosecutor explained she particularly wanted to show the TEC-9 "because it is not a weapon that one, if one sees it, that one would easily forget. And I think also in demonstrating the length of the magazine, it shows that it would be very obvious if someone were carrying a weapon like that. [¶] It is also not the kind of a weapon that a person could just put into their pants and not have be seen." The court agreed to admit the guns "for illustrative purposes only." It required the prosecutor to "make it very clear it is [for] illustrative purposes."

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[6] Sinclair refused to testify and was held in contempt.

Before she showed Rubin the .380, the prosecutor said, "I would like to just show you a weapon, just realizing this is not a weapon that has been recovered in evidence here. There is actually a weapon that has been brought from the Scientific Investigation Division collection, shall we say. Is that what it is?" The expert said it was. The prosecutor reiterated she was showing the gun "[j]ust to illustrate or show an example of what a .380 handgun might look like." The court then emphasized, "And that is the limited purpose, ladies and gentlemen." The prosecutor then asked Rubin, "Would this be a type of semiautomatic handgun that would use .380 caliber shells such as those that you looked at in this case?" Rubin said it would, then answered the prosecutor's questions about its magazine capacity and how quickly it fired.

The prosecutor then asked Rubin, "In terms of the type of weapon that would be consistent with firing nine millimeter cartridges, nine millimeter bullets in rapid-fire, up to 27 such as the 27 cartridges that you found here, I believe you said that one of the possible weapons would be an Intertec [*sic*] 9 or commonly known as the TEC 9?" Rubin replied, "Intertec [*sic*] 9 would be a possibility, yes." The prosecutor asked, "Do we have one again from your collection?" and Rubin responded that Detective Nolte had one in his hand. Rubin then described the operation of the gun and noted that the magazine on the demonstration gun held 32 cartridges.

Counsel for co-defendant Williams asked Rubin how many manufacturers made guns capable of firing a nine-millimeter Luger cartridge. Rubin replied, "A lot," and added, "It is a very common caliber." Rubin testified he had made a "not … all inclusive list" of 29 manufacturers who made guns that could fire nine-millimeter Luger cartridges and create the "general rifling characteristics" he found on the bullets in evidence. Large capacity magazines were available for at least six of those manufacturers' guns.

However, only one manufacturer made .380 caliber guns that would produce the general rifling characteristics he found on the bullets in evidence.[7]

After permitting the prosecutor to display the guns, the court admitted Chris Smith's prior statement to the police. Smith told the police he saw co-defendant Williams firing a TEC-9 and described it as a handgun with a long magazine and "holes in the front" near the barrel. Smith thought it was an automatic gun.

Appellant contends the trial court erred and violated his right to due process by admitting the exemplar guns.

"It is entirely proper for a prosecutor to use objects similar to those connected with the commission of a crime for purposes of illustration." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1135.) The prosecutor must first establish that the object is substantially similar to the one it purports to illustrate. (*People v. Roldan* (2005) 35 Cal.4th 646, 708 disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.) If a proper foundation is established, admission of the object is a discretionary decision. (*Ibid*.)

Nonetheless, relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The prosecutor laid a proper foundation for the .380 through the testimony of Ruben Sandoval and Walter Hernandez that appellant had a silver-colored handgun, the recovery of several .380 caliber cartridge casings, and Rubin's testimony that the demonstration gun was an example of a gun capable of firing .380 caliber cartridges. The recovery of 27 nine-millimeter cartridge casings, Rubin's testimony that a TEC-9 was a

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[7] Rubin was not asked whether the demonstration .380 was made by that sole

nine-millimeter gun that could be used with a magazine capable of holding 27 cartridges, and Smith's statement to the police that Williams fired a TEC-9 established an adequate foundation for the admission of the TEC-9. Notably, appellant's firearms expert later opined that, based upon the number of casings, the rifling on the recovered bullet, and the short time span within which shots were fired, use of a TEC-9 with a 30 round magazine was a "high possibility."

Although introduction of the demonstration weapons was not essential to the prosecution's case, they no doubt served to illustrate for the jury the types of weapons that may have been used. The .380 was potentially corroborative, as it matched the caliber of some of the recovered casings and one bullet and also apparently bore at least some resemblance to the gun Sandoval and Meza described in their testimony. The TEC-9 potentially assisted the jury by illustrating an extended magazine and a weapon that could fire 27 rounds in a short interval. Appellant does not explain why he believes the risk of undue prejudice from showing the jury the .380 substantially outweighed its probative value. The prosecutor repeatedly stated that both guns were merely illustrative and not the weapons used in the offenses. Nothing in the record suggests that viewing the .380 would tend to evoke an emotional bias against appellant without regard to the gun's relevance. Appellant argues that seeing the TEC-9 would evoke such an emotional bias because "[a] TEC 9 is an ugly weapon. It is large, threatening and scary with its long [magazine] and apparent ease of use as a killing machine." Appellant fails to explain how showing the "ugly," "scary" gun would evoke an emotional bias against him when the evidence showed only that Williams, not appellant, used the TEC-9. Moreover, the purportedly intimidating appearance of the TEC-9 was integrally related to relevant matters, in that the evidence tended to show Williams made the unfortunate choice of firing an "ugly," "scary" TEC-9 at the victims. The prosecutor was entitled to show the jury what a TEC-9 looked like. We cannot conclude the trial court abused its discretion

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manufacturer.

by permitting the prosecutor to display the demonstration weapons.

5. Admission of flight evidence and instruction upon flight

Over appellant's objection, the court permitted the prosecutor to introduce evidence that on February 11, 2004, appellant fled from Detective Nolte after Nolte showed appellant his police badge.[8] Appellant's car collided with another vehicle, and he then drove away from the scene of the collision, abandoned his car -- which struck several parked vehicles, and fled on foot with Nolte in pursuit shouting, "Stop. Police."

Also over appellant's objection, the trial court instructed the jury on flight using CALJIC No. 2.52.[9]

Appellant contends the trial court erred by admitting the flight evidence because it did not support an inference of appellant's consciousness of guilt. He argues there was no evidence the shooters fled the crime scene, and his subsequent attempt to evade Detective Nolte was unconnected to the charged offenses and could be explained by the fact he was a gang member and would not want to "stick around and have a conversation" with a police officer.

Flight requires neither running nor distance. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) It simply requires an apparent purpose to avoid being observed or arrested. (*Ibid.*) Although merely leaving a crime scene does not alone support an inference of consciousness of guilt, the circumstances of the departure may do so. (*Ibid.*)

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8 Appellant was in the process of parallel parking his car directly in front of Nolte's car. Nolte displayed his badge through his windshield as appellant stared at Nolte in the rearview mirror.

9 The court instructed the jury as follows: "The flight of a person after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination."

The interval of 11 days between the charged offenses and appellant's flight from Detective Nolte was not so lengthy as to nullify the inference of consciousness of guilt inherent in appellant's extraordinary measures to evade Nolte. Moreover, it occurred within the same jurisdiction and just a few miles from the crime scene. "Common sense, however, suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt. In *People v. Santo* (1954) 43 Cal.2d 319 [273 P.2d 249], for example, we held that the trial court properly admitted evidence of flight occurring more than a month after the charged murder because the facts fairly supported that inference." (*People v. Mason* (1991) 52 Cal.3d 909, 941.)

Appellant was free to argue his alternate explanation for his flight, but the possibility of an "innocent" explanation did not negate the inference of consciousness of guilt or preclude admission of the evidence.

Appellant further contends that instructing the jury on flight permitted an unjustified inference and thereby violated due process. A flight instruction is proper and required where the evidence shows that appellant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. (Pen. Code, § 1127c; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1055.) The California Supreme Court has repeatedly held that CALJIC No. 2.52 is a proper instruction. (*People v. Crew* (2003) 31 Cal.4th 822, 848-849; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224.)

The evidence of appellant's flight from Detective Nolte supported the trial court's decision to instruct with CALJIC No. 2.52. Moreover, Miguel Meza testified that as soon as appellant stopped shooting, he got into a silver Explorer and "just took off." Thus, contrary to appellant's assertion, there was evidence of immediate flight from crime scene that supported an inference of consciousness of guilt. As noted by the court

in *People v. Crandell* (1988) 46 Cal.3d 833, 870, overruled on another point in *People v. Crayton* (2002) 28 Cal.4th 346, CALJIC No. 2.52 does "not posit the existence of flight; both the existence and significance of flight were left to the jury." The jury was directed to disregard any instruction applying to facts that it determined did not exist. (CALJIC No. 17.31.) Accordingly, if the jury did not find that either appellant's rapid departure from the crime scene or his subsequent flight from Nolte constituted flight, it would simply disregard CALJIC No. 2.52 and would not infer consciousness of guilt. Accordingly, giving the instruction was, at worst, harmless. If the jury found flight, the instruction provided some protection to appellant by informing the jury it could not infer guilt from flight alone.

6. Sentencing issues

a. Gang enhancements to LWOP terms

With respect to each murder count, the trial court sentenced appellant to life in prison without possibility of parole and imposed, *inter alia*, a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). Appellant contends imposition of the gang enhancement was error. Citing *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), he argues the 15-year minimum parole eligibility period provided by section 186.22, subdivision (b)(5) applies instead of the determinate enhancement under subdivision (b)(1)(C).

Section 186.22, subdivision (b)(1) provides that the various determinate enhancements it sets forth apply "[e]xcept as provided in paragraphs (4) and (5)…." Subdivision (b)(5) states that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." In *Lopez*, the Supreme Court held that a defendant found to have committed first degree murder for the

benefit of a criminal street gang was *not* subject to a 10-year enhancement under subdivision (b)(1): "[W]e conclude that first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22 (b)(1)(C)." (*Lopez*, *supra*, 34 Cal.4th at p. 1004.) Instead, the 15-year minimum parole eligibility period provided by subdivision (b)(5) applied. (*Id.* at p. 1011.)

Unlike appellant, the defendant in *Lopez* was sentenced to a term of 25 years to life. The trial court apparently believed, and respondent argues, that *Lopez* carved out an exception for sentences of life without possibility of parole. In reviewing the legislative history surrounding the original enactment of section 186.22, the Supreme Court noted a "report written by the Youth and Adult Correctional Agency, which analyzed the financial impact of the provision: ' "This proposed provision relating to life terms [former section 186.22, subdivision (b)(3), now section 186.22(b)(5)] would apply to all lifers (except life without possibility of parole). This would result in these lifers having their first parole hearing delayed, except for first degree murderers with a sentence of 25 years to life."'" (*Lopez*, *supra*, 34 Cal.4th at p. 1010.) The court then summarized this aspect of the legislative history: "In sum, at the time the STEP Act was enacted, the predecessor to section 186.22(b)(5) was understood to apply to *all* lifers, except those sentenced to life without the possibility of parole." (*Ibid.*)

Nonetheless, *Lopez* did not rule upon the applicability of sections 186.22, subdivisions (b)(1) and (5) to a person sentenced to a term of life without possibility of parole. The language quoted in the preceding paragraph therefore cannot be considered to be authority for the proposition that subdivision (b)(5) is inapplicable where the term was life without parole. (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38.) We conclude that nothing in *Lopez*, the statute, or the legislative intent discussed in *Lopez* restricts the *Lopez* holding to cases involving life terms *with* possibility of parole. The court based its holding on the plain language of subdivisions (b)(1) and (5), which support application of subdivision (b)(5) to persons sentenced to

life without possibility of parole. Subdivision (b)(1) is inapplicable where subdivision (b)(5) applies. Subdivision (b)(5) expressly applies to "*any* person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison *for life*…." (Emphasis added.) The Supreme Court concluded in *Lopez* that the Legislature intended subdivision (b)(5) to apply to defendants convicted of first degree murder and sentenced to state prison for a term of 25 years to life, even when the minimum parole eligibility term in that subdivision "will have no practical effect" because the minimum parole eligibility term in the murder statute is longer. (*Lopez*, *supra*, 34 Cal.4th at pp. 1008-1009.) There is no reason to infer a different legislative intent where the defendant is punished for first degree murder with a term of life without the possibility of parole. Because first degree murder is "a felony punishable by imprisonment in the state prison for life" under subdivision (b)(5) -- whether a term of 25 years to life or a term of life without the possibility of parole -- the determinate terms provided by subdivision (b)(1) do not apply. We therefore strike the subdivision (b)(1)(C) enhancements imposed on counts 1 and 2.

b. Great bodily injury enhancements to counts 3 and 4

The trial court imposed and stayed section 12022.7 great bodily injury enhancements on counts 3 and 4. Appellant contends section 12022.53, subdivision (f) requires that these enhancements be stricken because the court imposed enhancements under section 12022.53, subdivision (d) for these counts.

Section 12022.53, subdivision (f) prohibits imposition of a section 12022.7 enhancement for great bodily injury in addition to a section 12022.53, subdivision (d) enhancement. In *People v. Gonzalez* (2008) 43 Cal.4th 1118, the Supreme Court interpreted section 12022.53, subdivision (f) to require staying, not striking, the enhancements it prohibits a trial court from imposing. (*Id.* at pp. 1129-1130.) Appellant's contention must therefore be rejected.

DISPOSITION

The 10-year section 186.22, subdivision (b)(1)(C) enhancements for counts 1 and 2 are stricken. The trial court shall amend the abstract of judgment to reflect this modification. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.